Judicial Training Project

Roadmap To European Effective Justice (Re-Jus): Judicial Training Ensuring Effective Redress To Fundamental Rights Violations

EXECUTIVE SUMMARY

OF THE MIGRATION CASEBOOK

THE RE-JUS PROJECT IS CO-FUNDED BY THE JUSTICE PROGRAMME OF THE EUROPEAN UNION
(JUST/2015/JTRA/AG/EJTR/8703)

Published in October 2018

Executive summary of the Migration Casebook

Purpose of the Casebook: The *Re-Jus Casebook on effective justice in the field of asylum and immigration* aims to showcase the requirements introduced by Article 47 of the EU Charter (the right to fair trial and effective remedy), Article 41 of the EU Charter (the right to good administration), and of the EU law on the general principles of good administration, the rights of defence, equivalence, effectiveness and proportionality in the field of asylum and migration.[1] Although the aforementioned EU secondary instruments and the implementation of domestic legislation set out detailed standards, the European and national courts have developed additional standards, rules, individual rights and obligations that are incumbent upon national authorities, and have reconfigured judicial review powers and the duties of national courts which are equally binding. The main purpose of the Casebook is to sketch out these new jurisprudential rules and their impact at the national level, which are not easily found in textbooks or compendia. The Casebook also integrates the complementary added value of Articles 3, 5(1)(f), 8 and 13 of the ECHR to the developed norms of EU law.

The Chapters include several cases clustered around various questions and framed within the structure of judicial dialogue between the European and national courts. An innovative purpose of the Re-Jus Casebook is to offer examples of how judicial dialogue and cooperation have contributed to the impact of Article 47 of the EU Charter and the general principles of EU law in the field of asylum and immigration. To achieve this purpose, the Casebook maps out the existing and emerging patterns and techniques of judicial interaction and cooperation and presents their concrete outcomes in the fields of asylum and migration. These strands of judicial interaction might be *vertical*, for example arising between the national and European courts or *horizontal*, between the national courts from the same or from different Member States, on the one hand, and between the CJEU and the ECHR, on the other. The impact of these instances of judicial dialogue on national jurisprudence, legislation, and administrative practice will be traced. The analysis will cover various Member States to show how a preliminary reference or international judgment is applied at the domestic level and also to identify whether divergent jurisprudence has developed that needs particular techniques of judicial interaction to redress the inconsistency.

The ultimate purpose of the Re-Jus Casebook is to offer in-depth information to judges and other legal practitioners on the rules, standards, rights and obligations that have been developed by European and national courts on the basis of Article 47 of the EU Charter and the general principles of good administration, as well as the rights of defence, effectiveness and proportionality in the field of asylum and immigration.

Chapter 1 – Impact of the principle of effectiveness and the right to fair trial on asylum evidentiary procedural rules

This Chapter analyses, from both a top-down and bottom-up approach, the impact of: the right to a fair trial and effective remedy enshrined in Article 47 CFR; the principle of effectiveness of the EU right to asylum and the principle of non-refoulement, on domestic evidentiary procedural rules, investigative

[1] The following instruments are addressed: Revised Asylum Procedures Directive: Revised Reception Conditions Directive (detention provisions - Articles 8-11); Revised Qualification Directive: in particular, Article 4 on the assessment of facts and law is of particular importance; Dublin III Regulation (detention, Article 28); Return Directive : in particular Chapter III on procedural guarantees, and Article 15 on detention.

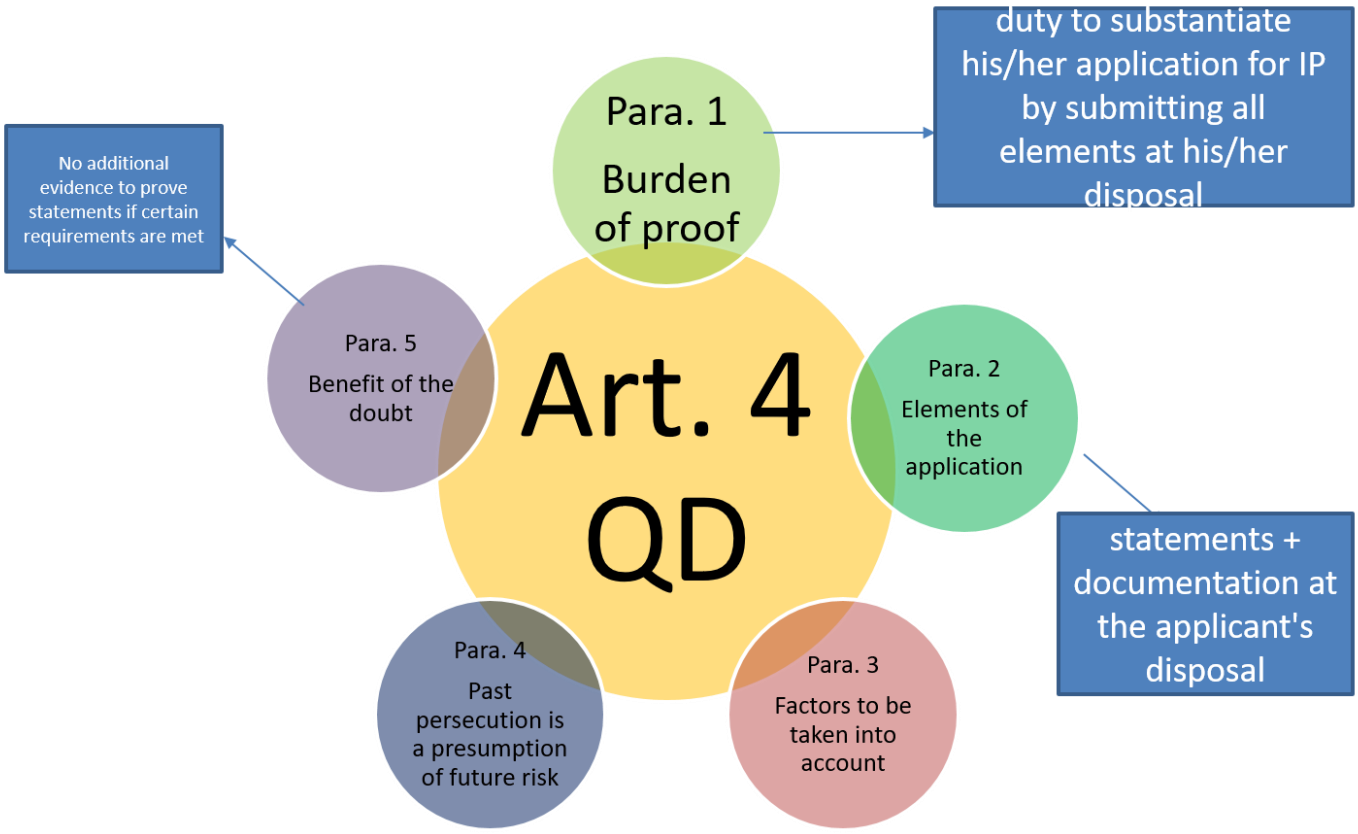
powers, and the duties of national courts during asylum proceedings. The analysis is divided across the four main stages of asylum evidentiary procedure:

1. Burden of proof
2. Duty of cooperation
3. Elements of evidence
4. Standards of proof and the benefit of doubt

1. Burden of proof

The investigative procedure in asylum proceedings is among the most complex issues due to the limited documentary evidence possessed by asylum seekers and the anticipatory assessment that administrative authorities and judges must perform in order to establish whether there is a risk of persecution resulting from the return of the asylum seeker to his/her country of origin. Due to these specificities, Article 4 of the Qualification Directive sets out specific rules on the investigative process: a shared burden of proof between the asylum seeker and the competent domestic authorities; alternative elements of proof to documentary evidence; the benefit of doubt in certain circumstances. Asylum evidentiary procedural rules are thus *lex specialis* which should be given priority to procedural rules in other fields of law.

What kind and how much evidence under Article 4 QD?



21

The primary rule introduced by Article 4 of the Qualification Directive is that the burden of proof should be shared between the asylum seeker and the competent domestic authorities. Additional clarification of the 'burden of proof' requirements have been provided by European and national jurisprudence on the basis of Article 47 of the EU Charter and the general principles of EU law.

According to the settled case law of the CJEU (*Steffensen*[2] and Boiron[3]), evidentiary rules fall under the principle of effectiveness of EU law. Where the national court finds that evidentiary requirements render it impossible or excessively difficult to the individual to exercise a right granted by the EU (in this case the right to access international protection), then it must declare the domestic evidentiary related rule incompatible with the principle of effectiveness of EU law. Within national legal systems, the burden of proof can vary depending on the applicable type of procedural rules. The EU law principle of effectiveness thus has a different effect in practice depending on whether the applicable domestic procedure is civil or administrative, with differences within the various domestic types of administrative proceedings as well.

Additional clarification of evidentiary rules provided by the CJEU:

1. **M.M. (1) – C-277/11**

FIRST STEP: it is generally for the applicant to submit all elements needed to substantiate the application." THEN the burden shifts to the public authorities.

2. **A.B.C. – C-148/13 – 150/13**

Article 4(1) QD requires evidence to be submitted 'as soon as possible' without clarifying the temporal duration of this notion. The CJEU clarified the meaning of 'as soon as possible' in *A.B.C.:*

"the requirement of the presentation of facts as soon as possible must be in accordance with the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality. Therefore, it cannot be concluded that declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset."

Additional clarification of evidentiary rules provided by ECtHR and examples of domestic implementation of the ECtHR standards

According to *J.K. v Sweden, judgment of the ECtHR,* "*the burden of proof should not render ineffective the applicants' rights protected under Article 3 of the Convention. It is also important to take into account all the difficulties which an asylum-seeker may encounter abroad when collecting evidence."*

With regard to the moment when the burden of proof shifts from the applicant to the competent authorities to dispel doubts, the ECtHR holds that once the applicant has produced a medical certificate, although not prepared by an expert in assessment of torture injuries "*the onus rest[ed] with the State to dispel any doubts about the risk of being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeded.*"
The remedy for cumbersome national rules on burden of proof which renders ineffective the applicant's rights under Article 3 of the ECHR should be disapplication leading to the shift of the burden of proof from the applicant to the courts or national authorities (*R.C. v Sweden*).

2. Duty of cooperation

[2] C-276/01, ECLI:EU:C:2003:228.
[3] C-526/04, ECLI:EU:C:2006:528.

Article 4(1) QD imposes a duty on the authorities to assess the relevant elements of the application for international protection in cooperation with the applicant. Guidelines on the precise implementation of this provision have been provided by jurisprudence of the CJEU and domestic jurisprudence implementing the CJEU set standards.

For instance, the EU principle of effectiveness of the EU right to asylum and the principle of non-refoulement require national authorities to disapply national procedural limitations of judicial investigative powers, and allow them to consider *ex officio,* complete, up to date or relevant evidence, country of origin information in particular. (***M.M. (1)***).

The duty of cooperation requires the national authorities to assess all information brought to their attention, even if the applicant does not wish to rely on certain evidence (*in casu*, conversion from Islam to Christianity in Sweden). The ECtHR thus clarifies that Article 40(2) and recital 36 of the Asylum Procedure Directive, although they give discretionary powers to the Member States to dismiss subsequent asylum applications not based on new evidence as inadmissible, they cannot establish evidentiary procedural rules which would lead to violation of the principle of non-refoulement which is an absolute fundamental right (*F.G. v Sweden*).

Irrespective of whether a generalised risk or individual risk of ill treatment is found in the country of origin of the applicant, a national court must consider *ex officio* both risks, even if not expressly invoked by the applicant (*F.G. v Sweden*,[4] *Elgafaji*, and *Diakité).*

The burden of proof in cases of subsidiary protection based on 'generalised violence':

The CJEU underlined in *Diakité* that:

- *first*, there is no need to qualify the agents in conflict;
- *second*, it is only necessary to establish whether the conflict can be characterized by a "degree of indiscriminate violence, so high" as to indicate on a solid basis that being present in the country or region in question, would subject the applicant to a real risk of being subject to that threat;
- *third*, there is no need to carry out, "in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict."

The *Elgafaji* and *Diakité* preliminary rulings thus require a relaxation (alleviation) of the burden and standards of proof and therefore a neutralisation of excessive obstacles towards ensuring effective justice. They also establish concrete standards on the duty of cooperation of public authorities. Notably, an expansion of the duty of cooperation since more risks need to be assessed by the judge *ex officio.*

On the basis of the duty of cooperation and CJEU and ECtHR jurisprudence, the **Italian Supreme Court** imposed a duty on the national courts to consider of their own motion the general situation in the country of origin and assess whether Article 15(c) of the Qualification Directive, namely the generalised risk of harm, is applicable, even if not expressly invoked by the individual. The duty to cooperate implies that the judge must admit measures of inquiry on his own motion and verify the credibility of the asylum seeker's application with regard to updated country of origin information, which the adjudicating judge must assess on his own.

In conclusion, a significant concrete application of the duty of cooperation brought by CJEU jurisprudence herein mentioned is that national courts need to consider *ex officio* new elements of evidence when assessing the credibility of asylum seekers (see, inter alia, *A.B.C, and Diakité*).

[4] ***The ECtHR*** clarified that the duty of cooperation requires national authorities to assess all information brought to their attention, even if the applicant does not wish to rely on certain evidence (*in casu*, conversion from Islam to Christianity in Sweden). The ECtHR recently assessed the legitimacy of national evidentiary procedural limitations which at first sight adequately transpose provisions from the Asylum Procedure Directive in light of requirements under Article 3 of the ECHR.

3. Elements of evidence

A list of relevant elements of evidence in support of the asylum application can be found in Article 4(2) of the QD.[5] With regard to assessment of the evidence, principles are to be found in Article 4(3): individual assessment, and the factors to be taken into account. Article 10(3) Asylum Procedure Directive contains further principles that should guide evidence assessment: an individual, objective and impartial examination and decision. **Article 10(3)(b)** requires that precise and up-to-date country of origin information should be considered for the examination of the application. While **Article 10(3)(d) mentions** the possibility of seeking expert advice whenever necessary.

The individual assessment principle required by Article 4(3) QD has been further clarified by the CJEU in *Y and Z*: "*the competent authorities carry out an assessment of an application for international protection on an individual basis, they are required to take account of all the acts to which the applicant has been, or risks being, exposed, in order to determine whether, in light of the applicant's personal circumstances, those acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive.*"

The CJEU added in *Y and Z* with regard to the extent of the required risk of persecution: the possibility of avoiding persecution by hiding or avoiding the public practice of religious belief cannot be taken into consideration within the assessment of the risk of persecution.

CJEU: prohibited evidence and methods of collecting evidence (*A, B, C* and *F* cases[6]):

- Asylum applicants may not be questioned on the details of their sex lives, nor can evidence, including videos, pictures of sex acts be accepted. (see *A, B, C*)
- Fundamental rights guaranteed by the Charter cannot be considered as evidence during asylum proceedings; (see *F*)
- Administrative authorities and courts or tribunals cannot "base their decision on an asylum application based on persecution for sexual orientation solely on the conclusions of the expert's report and they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation." (see *F*)
- Article 4 of the QD "read in light of Article 7 of the Charter, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant." (see *F*)
- Failure to reveal sexual orientation early in an application for asylum is not necessarily fatal to the credibility of an applicant. (see *A, B, C*)
- Failure to mention LGBT related organisation cannot constitute the sole grounds for rejecting the credibility of an asylum seeker requesting international protection on the basis of persecution on grounds of sexual orientation. (see *A, B, C*)
- Administrative authorities must provide details regarding the form of questions posed to ensure that respect for private life and human dignity is maintained[7] (see *A, B, C*).

[5] It consists of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.
[6] C -148/13 to C-150/13, *A, B, C*, ECLI:EU:C:2014:2406 and C-473/16, F, ECLI:EU:C:2018:36.

- The Court held that it follows from the *principle of non-refoulement* that an individual who is in the process of subsidiary protection must have the opportunity to state all reasons and circumstances that are relevant for the prolongation of the status of protection to the extent that limiting procedural norms should be disapplied (see *A, B, C*).

4. The standard of proof and the benefit of the doubt

In principle, Member States are free to set their own standards of proof. However, "they are prohibited from laying down unrealistic standards for the evidence required, as this may undermine the effectiveness of EU rights," such as the EU right to asylum and the prohibition of *non-refoulement* (Opinion of AG Sharpston in *Bolbol*).[8] The Opinion of AG Sharpston has been confirmed by the ECtHR, which in *M.S.S and others v Belgium and Greece* held that the Aliens Appeal Board violated Article 3 of the ECHR by requiring applicants to produce "*concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3 of the ECHR.*"

Post-flight activities *in loci* can also lead to the risk of ill-treatment. (*A.A. v Switzerland*, ECtHR)

Article 4(5) QD provides for an alleviation of the asylum seeker's *onus probandi* (A.B.C.). According to this provision, where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when conditions listed in subsequent letters from a) to e) are cumulatively met.

National judges in evidentiary assessment - In these cases, the judge has a positive duty to collaborate in assessment of the facts, which also implies concrete fact-finding tasks.

- **The Tribunal of Catanzaro** has shown an interesting approach to the standards of proof and the benefit of doubt in asylum applications based on the persecution of sexual orientation. The approach of the Tribunal was to suggest that the claimant actively attend the activities of a LGBT organisation and to postpone its decision on the substance for several weeks after re-hearing the applicant. The positive reaction of the applicant and of the organization's report determined the Court's finding Article 4(5)(b) conditions applicable and thus the applicant worthy of the benefit of the doubt. The Tribunal observed that the duty of cooperation in this case was bilateral, acknowledging the willingness of the applicant to answer questions and proposals. The Court made direct application of the CJEU preliminary ruling in *X, Y, Z* (paras. 58-60) that: "*In undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant's country of origin, the term of imprisonment provided for by such legislation is applied in practice. It is in light of that information that the national authorities must decide whether it must be held that in fact the applicant has a well-founded fear of being persecuted on return to his country of origin within the meaning of Article 2(c) of the Directive, read together with Article 9(3) thereof.*"

Judicial dialogue: Conclusions

Consistent interpretation is used both by the national and European courts for the purposes of ensuring the conformity of national evidentiary procedural laws with EU and ECHR standards; the European Courts

[7] Council of States, Netherlands, 201208550/1/V2, 201110141/1/V2, 201210441/1/V2, see more details in the *ACTIONES Module on the Judicial Application of the EU Charter in asylum and immigration*.

[8] See also the CJEU in *Pontin*, "this means that whilst Member States retain the right to lay down, under national law, the applicable rules of evidence, those rules must not make it impossible or virtually impossible for an applicant to claim rights guaranteed by EU law" (Case C-63/08 *Pontin*, para. 43).

used it for the purpose of ensuring coordination of their approaches on evidentiary standards under the principle of non-refoulement and of other fundamental rights.

The outcome of the judicial dialogue is disapplication of domestic procedural rules for the benefit of more lenient evidentiary requirements, and extension of the positive obligation of national courts in terms of fact finding and evidence assessment under the impact of the EU duty of cooperation. For instance, the **Italian Court of Cassation** established a judicial duty of probative inquiry, which would require contacting diplomatic channels or even international rogatories in order to clarify the authenticity of documents and statements. The case law of the **Italian Court of Cassation** and of the **Sofia City Administrative Court** reflects the impact of the CJEU in *Elgafaji and Diakité* on national jurisprudence, which, by changing the jurisprudence of the Supreme Court, also spills over into the jurisprudence of national courts.

The **Slovenian Constitutional Court** made an interesting application of the *consistent interpretation technique* in order to decide whether the national legal provisions limiting procedural evidence in cases of renewal of subsidiary protection are compatible with Article 18 of the Constitution. This Article, enshrining the prohibition of torture and ill treatment, was interpreted in light of the specific requirements of Article 19 of the EU Charter, the principle of non-refoulement.

Furthermore, in order to understand the precise requirements of Article 45 of the Asylum Procedure Directive (which stipulates that the competent authority will have to obtain information as to the general situation prevailing in the countries of origin of the persons concerned), the **Constitutional Court** also referred to Article 3 of the ECHR and ECtHR jurisprudence, which requires an *ex nunc* assessment of the situation in the country of origin.

The **Constitutional Court of Slovenia** also made use of the *disapplication technique* by striking down Article 106 of the International Protection Act on the basis of its incompatibility with Article 18 of the Constitution as interpreted in light of Article 19 of the EU Charter and Article 3 of the ECHR.

Chapter 2 – The right to be heard

This Chapter briefly presents the main guarantees of the right to be heard introduced by CJEU jurisprudence in both asylum and return adjudication. The chapter follows the guarantees of the right to be heard first within administrative asylum proceedings, then before the court in international protection proceedings, and concludes with the guarantees developed by the CJEU and developed by the national courts in return proceedings.

It is settled case law that the legal source of the right to be heard during domestic asylum or return administrative proceedings, which falls within the scope of EU law, is the general principle of the rights of defence.[9] *Article 41 CFR does not apply to Member States when acting within the field of EU law, since it only applies to the EU institutions, bodies, offices, and agencies of the European Union.*

Member States are bound to respect the right to be heard even in the absence of an express EU or national legislation that provides for it, as a component of the general principle of the rights of defence (Case 301/87, *France v. Commission*, *Boudjlida*, as well as *M.M. (2)*).

The remaining guarantees enshrined in Article 41 of the Charter apply to Member State actions as part of the principle of good administration, which is broader than the rights of defence (H.N.[10]).

The right to be heard as part of the general principle of the rights of defence in EU law requires that:

[9] See C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para. 61; C-166/13, *Mukarubega*, EU:C:2014:2336, para. 44; Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, para. 32-33.

[10] According to the CJEU, "the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law" (para. 49).

- Given the fundamental nature of the applicant's right to be heard it should be fully respected in both asylum and subsidiary protection proceedings, when these are separated. In *M.M. (1)*, the Court of Justice left it to the national court to decide whether the EU right to be heard was respected during the procedure in which the application for subsidiary protection was assessed.
- The asylum seeker should be given sufficient opportunities to substantiate his/her asylum claim, for example by submitting written information;
- This right also requires the authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision (*M.M. (1)*).
- In the specific circumstances that a decision on subsidiary protection takes place immediately after asylum proceedings, an interview must be arranged if the competent authority is not in a position to reach a conclusion with full knowledge of the facts based on the available evidence. The interview must also be arranged if the personal circumstances of the applicant (in particular, any vulnerability due to age, health conditions or for being a victim of violence) makes it necessary for him/her to comment in full on the elements capable of substantiating the application (*M.M. (2)*).

The principles developed by the CJEU on the right to be heard in return proceedings can also be applied by analogy to the field of international protection proceedings:

- The purpose of the right to be heard before the adoption of an administrative decision entailing negative consequences for the individual is to enable the person concerned to express his point of view with regard to the merits of the decision (e.g. the legality of his stay) and on whether any of the exceptions to the general rule (issuance of a return decision) are applicable. Additionally, the purpose of the right to be heard is, *inter alia*, to enable that person to correct an error or submit such information relating to his or her personal circumstances (see *YS and Others*; *Mukarubega*; *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*);
- National authorities must take due account of the best interests of the child, family life and the state of health of the third-country national concerned and respect the principle of non-refoulement within the hearing;
- The competent national authorities are under an obligation to enable the person concerned **to express their point of view on the detailed arrangements for their return** (such as the period allowed for departure and whether return is to be voluntary or coerced), with the possibility that the period for voluntary departure may be extended according to the specific circumstances of the individual case (such as the length of stay, the existence of children attending school and other family and social links).
- Where the national authorities are contemplating the simultaneous adoption of a decision determining a stay to be illegal and a return decision, those authorities need **not necessarily hear** the person concerned specifically on the return decision, since that person had the opportunity to effectively present his/her point of view on the question of whether the stay was illegal and whether there were grounds which could, under national law, entitle those authorities to refrain from adopting a return decision;
- A competent national authority is **not required to warn a third-country national** that it is contemplating adopting a return decision with respect to him/her, or to disclose to him/her the information which it intends to rely on to justify that decision, or to allow a period of reflection before seeking his/her observations. EU law does not establish any such detailed arrangements for an adversarial procedure.
- It is therefore sufficient if the person concerned has the opportunity effectively to submit their point of view on the subject of the illegality of their stay and reasons that might justify the non-adoption of a return decision.

- **An exception must however be admitted where a third-country national could not reasonably suspect what evidence might be relied on against him/her or would objectively only be able to respond to it after certain checks or steps were taken with a view, in particular, to obtaining supporting documents.** Further, the Court states that return decisions may always be challenged by legal action, so that the protection and defence of the person concerned against a decision that adversely affects him/her, is ensured.
- The right to be heard is not an absolute right and may be limited, provided that this restriction satisfies the examination of proportionality;
- The **infringement of the right to be heard does not automatically entail the annulment of the decision; the court must assess whether, in light of the actual and legal circumstances of the case, the outcome of the administrative procedure at issue "could have been different if the third-country national in question had been able to put forward information which might show" that the negative administrative decision would had been different**;
- Following the CJEU judgment, the **Dutch Council of State** ruled that the principles formulated in G. and R. also apply in the procedure that regulates the taking of a return decision by the administration. If the right to be heard has not been observed by the administration, the court should determine whether this has deprived the third-country national of the possibility of bringing forward circumstances which could have led to a different decision. If this is not the case, the judge hearing the appeal against the return decision will not quash the decision (Council of State, 24 June 2014, 201309226/1/V3).
- In the specific circumstances that a decision on subsidiary protection takes place immediately after asylum proceedings, an interview must be arranged if the competent authority is not in a position to reach a conclusion with full knowledge of the facts based on the available evidence The interview must also be arranged if the personal circumstances of the applicant (in particular, any vulnerability due to age, health conditions or for being a victim of violence) makes it necessary for him/her to comment in full on the elements capable of substantiating the application (*M.M. (2)*).
- According to the CJEU preliminary ruling in *Sacko Moussa*, national legislation should leave the freedom to decide an oral hearing to the national courts if they consider it necessary for the purpose of fulfilling their obligations under Article 46(3) even in cases of manifestly unfounded applications.
- **The judge shall evaluate whether the information in the case-file – including the report of or the transcript of personal interviews where applicable – is sufficiently informative as to exclude the need of a personal hearing in the judicial phase.**

Other corollaries of the principle of the rights of defence: national authorities should pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision. The obligation to state reasons for a decision, which are sufficiently specific and concrete to allow the person to understand why his application is being rejected, is thus a corollary of the principle of respect for the rights of the defence (*M.M. (2)*).

The right to be heard in cases of groups of asylum seekers - Guidelines emerging from the ECtHR and CJEU on collective expulsion:

- Article 4 of Protocol 4 guarantees the right to an individualized and genuine examination, which is respected when the individual is given the opportunity to put arguments against their expulsion to the competent authority on an individual basis prior to removal; the right to an individual interview in all circumstances is not covered by the Convention (there is no absolute right to be heard individually);

- Removal does not amount to a collective expulsion when the absence of an individualized examination is the consequence of the culpable conduct of the individual concerned;
- The right to an effective remedy against expulsion as well as the opportunity to appeal against the refusal-of-entry order is guaranteed when the individual concerned has given adequate information;
- The right to be informed promptly, in a language which he/she understands, of the reasons for his/her arrest and of any charge against him/her is violated when: a) the refusal-to-entry order does not provide any reference to the individual's detention or to legal or factual reasons for such measures; and b) the order is not communicated promptly to the individual.

Chapter 3 – Access to a court

The **CJEU** holds that the principle of effective judicial protection, affirmed in Article 47 CFR, comprises various elements. Among them, the Court included the right of access to a tribunal (see CJEU, C-69/10, Diouf, para. 69; C-348/16, Sacko, para. 32). Accessibility to a tribunal means not only availability of an independent court with jurisdiction and/or that is capable of securing effective reparations, where appropriate, but also that such access may not be subject to conditions that make it impossible or extremely difficult to exercise the right of accessing a court.

Impediments to effective access to a tribunal or court may result from national *procedural norms* (for instance, the short period of time available for lodging a complaint) or even from *material factors*, which prevent the individual from effectively exercising his right of access to a tribunal (e.g. language and economic requirements). In the case of asylum seekers and irregular migrants, Member States must provide for compensatory remedies, which take the form of a state duty to provide for certain services (for instance, translation and legal aid), aimed at making access to court effective.

The right to access to a tribunal is not an absolute right and it can be subject to limitations. Member States may set limitations provided that they pursue a legitimate aim and are proportionate (Article 52(1) EU Charter).

In the ***El Hassani*** case, the CJEU held that Article 47(2) of the EU Charter provides that everyone is entitled to a hearing by an independent and impartial tribunal. The **concept of independence**, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. This was not the case of the Polish consulate in the El Hassani case. Therefore, this decision was then subject to subsequent control by a judicial body that had to, in particular, have jurisdiction to consider all relevant issues. Following the preliminary ruling, the Polish Ombudsman asked the Minister of Foreign Affairs to prepare a draft amendment of the law on proceedings before administrative courts which would enable appeals to be lodged with the courts against Schengen visa refusals.

Effective remedy and the right to access an independent Court

The right to an effective remedy has been interpreted as permitting judicial review of detention by individual application as well even if national law only sets out ex officio judicial review. Although under Italian law, in cases of extended detention of an asylum seeker, only *ex officio* judicial reviews are admitted, to be carried out at regular intervals of 60 days, the **Tribunal of Turin** allowed an action to be brought by a detained asylum seeker against an on-going detention.

In *HID and B.A.* (C-175/11) the CJEU highlights that the independence of the judiciary has an **external** and **internal** dimension. Whereas the former dimension indicates that the judge must be

protected against external interventions or pressures liable to jeopardize their independent judgment with regard to the proceedings before them, the latter refers to the impartiality in ensuring a level playing field for the parties to the proceedings and their respective interests. However, the Court of Justice stresses that in order to assess the effectiveness of the remedy and independence of the judge, due account must be given to the administrative and judicial system of each member State as a whole. The CJEU interpreted the notion of a Court, within Article 39 of the 2005/85 directive, in relation to the meaning of a court within Article 267 TFEU, since the recital of the 2005/85 directive made this connection itself. This is no longer the case under the new Recast Asylum Procedure Directive, where this recital has been omitted. It may also be argued that the two norms do not have the same function. Whereas Article 267 TFEU has the primary function to ensure, though preliminary reference, the full effectiveness of EU norms and, as such, deserves a broad interpretation of the notion of 'court,' Article 46 of the Recast APD has the primary function of reviewing an administrative decision by an independent judge in an area where absolute fundamental rights are at stake. This should suggest that the independence requirements are to be assessed with stricter scrutiny.

Effective remedy and strict time limits to lodge an appeal: the case of asylum procedures

Both the *Danqua* (C-429/15) and the *Diouf* (C-69/10) CJEU decisions suggest that national rules that set time-limits in relation to the asylum procedure must be assessed in light of the right to an effective remedy.

The decision of the administration to submit asylum claims to an accelerated procedure rather than an ordinary one cannot be challenged independently provided that the decision rejecting the application may be subject to a thorough review by the national court (*Diouf*).

The judge must be in the position to evaluate specific individual circumstances taking different elements into account such as the individual condition of the party, the complexity of the procedure and of the legislation to be applied, as well as any other public or private interests which must be taken into consideration. It is mainly up to the national judge to carry out this evaluation, according to the proportionality principle, and to decide whether the time limit had the result of rendering the right to an effective remedy extremely difficult to exercise. (*Danqua*).

If individual circumstances suggest that the party did not have time enough to prepare its defence, the judge must be in a position to order the administrative authorities to re-examine its application under an ordinary procedure (*Diouf*).

Some issues still remain to be clarified. The Court did not expressly consider the case where the individual was not able to make the appeal in due time due to specific and personal circumstances. This might occur due to conditions of illiteracy on the part of the individual or scarce knowledge of the language or in cases where the individual is detained and he/she did not have access to legal representation and/or legal aid in due time. In some Member States (*Italy, the Czech Republic*) these are good grounds that permit consideration of the appeal on its merit, even if the deadline for lodging the judicial appeal had expired.

The Right to an effective remedy and the positive duties of Member States to make access to a judge effectively available: the case of legal aid.

The **Tribunal of Milan** (Decree n. 35445, 28 June 2017) referred to Article 47 of the EU Charter and considered the current practice of many bar associations - which systematically consider a request for legal aid to bring appeal against negative administrative asylum decisions as clearly unfounded - to be

contrary to the right to an effective remedy. The **Tribunal of Milan** also relies on the same Charter provision to extensively interpret the national procedural rule so as to avoid a declaration of inadmissibility, due to the lack of formal requirements in the legal aid request.

The **Czech Supreme Administrative Court** (N. 4 AZS 122/2015, 30 June 2015) decided that the applicant (an irregular TCN detained as a consequence of an order to leave) was entitled to an exception from the obligation to lodge an appeal within five days, due to the fact that the competent administrative authorities failed to demonstrate that detention facilities effectively guaranteed the right to legal assistance. For this reason, the SAC quashed the appellate decision that considered the claim inadmissible.

Legal aid: In order to allow an asylum claimant and/or an irregular third country national, subject to a return decision, to have effective access to a judge, Member States have the duty to provide information regarding the procedures and to grant legal assistance, legal representation and legal aid. Legal aid is different from legal assistance and legal representation since it means providing free legal assistance and legal representation to individuals who cannot afford to pay.

Chapter 4 – The rights of defence in cases regarding national security

The provisions of the EU secondary instruments allowing limitations to rights on the basis of national security must be interpreted and applied in conformity with Article 47 CFR.[11] The national security cases also reveal the importance of Article 19(2) CFR,[12] the principle of non-refoulement, which admits no derogation, due to its absolute legal nature.[13]

Article 47 EU CFR also applies to Member States irrespective of the degree of procedural autonomy recognised, when the later are derogating from EU provisions (see the CJEU when assessing the admissibility of the preliminary ruling in the ZZ case).[14]

According to the CJEU preliminary ruling in ZZ, non-disclosure of evidence is justified only when 'strictly necessary' and only "in exceptional circumstances." Furthermore, individuals must have the possibility of challenging both the validity of the reasons given by the public authorities and the validity of the decision based on those reasons related to national security.
According to Article 47 of the EU Charter, the national court must have the right to review both the reasons for non-disclosure of evidence and the full decision of the public authorities. The Court of Justice rejected the full discretion of the administration over State security matters (ZZ, para. 62).
Public authorities need to prove that State security would in fact be compromised by full disclosure of the evidence to the person concerned.
The national court must have the possibility of requesting full disclosure of the grounds on which the contested decision was taken to the person concerned, if it finds the limitation to disclosure is not justified or **proportionate**. If that authority does not authorise their disclosure, the court must proceed to examine the legality of such a decision on the basis of solely the grounds and evidence which have been disclosed (para. 63). The CJEU unequivocally held that it is the duty of the national court:

[11] On the general obligation to interpret the provisions of EU secondary instruments in conformity with the Charter, see Cases C293/12 and C594/12, Digital Rights Ireland, ECLI:EU:C:2014:238.
[12] Article 19(2) CFR contains a prohibition on removing, expelling or extraditing any person to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Article 19(2) CFR corresponds to Article 3 of the ECHR, and so must be interpreted similarly according to Article 52(3) CFR.
[13] The absolute legal nature of Article 19(2) CFR has been affirmed by the CJEU in Abdida, para. 46, see the chapter on the right to an effective remedy and suspensive effect of appeal.
[14] For a general application of this interpretation of Article 47 of the EU Charter requirements outside the field of asylum and immigration, see M. Safjan, King's College London, February 2014, A Union of Effective Judicial Protection Addressing a multi-level challenge through the lens of Article 47 CFR and by the same author, Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union, EUI Centre for Judicial Cooperation DL; 2014/02.

"to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him."

Implementation of the ZZ preliminary ruling by the referring court: The **Court of Appeal** held that the appellant had not been given the minimum level of disclosure required by EU law (as interpreted by the CJEU). It remitted the case to the Special Immigration Asylum Commission for a new assessment in light of the CJEU decision in *ZZ*. Following the words of the CJEU and the AG, the **UK Court of Appeal** required that an appropriate balance between national security interests and individual rights be struck. It also invited the Special Immigration Asylum Commission to take into consideration the impact non-disclosure might have on the appellant.

Judicial dialogue clarifying the standards to be followed by limitations to the right to a fair trial due to national security concerns

1. The *ZZ* preliminary ruling can be categorised as one of principle that can have **cross-border** (outside the territory of the Member States) and **cross-sectorial** (also in other fields of EU citizenship, such as asylum, migration, and immigration) application. It underlines the wide material scope of the application of Article 47 of the EU Charter.
2. Given that the principles developed by the CJEU concern the requirements imposed by Article 47 of the EU Charter on disclosure of evidence, the CJEU standards should be applied to all individuals falling under the territorial jurisdiction of the EU, irrespective of their legal status. Although the Charter recognises certain rights only for EU citizens (most of those in Title V), Article 47 is part of Title VI of the Charter, which provides for rights that are universal, meant to protect every person falling under the jurisdiction of the EU and its Member States.
3. The **Court of first instance of Hague** applied the requirements developed by the ***CJEU in ZZ***, on the application of Article 47 of the EU Charter, to a refugee whose status had been revoked by the administration. The Court held that its judgment could only be based on facts and documents that had not been disclosed to the applicant insofar as this was absolutely necessary for reasons of state security, and that the applicant would always have the right to be informed of the essence of the grounds on which the decision against him was based, considering the necessary confidentiality of the evidence.

The conformity of the special procedure for nominating security cleared advocates in national security cases with Article 47 of the Charter and Article 6 of the ECHR

- As a remedy for the limitation on access to evidence and court hearings in cases of national security, Member States have introduced the mechanism of security cleared counsels who have wider access to the secret evidence and court hearings.
- The *A.M.N.* case (High Court of Cassation and Justice) shows that, when national courts do not thoroughly consider limitations on the rights of defence in light of both ECHR and EU sources, and do not engage with the issues concerning legislative incoherence for the purpose of establishing a right balance between securing national security and fundamental rights, third country nationals concerned resort to the ECtHR for an effective remedy. One option for the Court could have been to consider addressing preliminary questions to the CJEU with regard to the conformity of the national urgent procedure in national security cases and the special procedure for nominating security cleared counsels in light of Article 47 of the EU Charter.

Judicial Dialogue clarifying the meaning of 'essential grounds' to be disclosed in national security cases

- With regard to the meaning of 'essential grounds' in national security cases involving non-EU citizens, the CJEU has not fully clarified its content. Examples of what 'essential grounds' could mean have been provided by the CJEU in *Kadi II*, which is a case on EU sanctions. Details on links to terrorist activist, the time and location of a contested behaviour seem to be considered by the CJEU as 'essential grounds.' (see paragraph 141ff, also cited in the section on Overview of CJEU jurisprudence)
- The Polish Supreme Administrative Court had the opportunity to address such a preliminary ruling, however it did not find it necessary to do so. It found that Article 12(1)2 of the Return Directive, which allows for the non-disclosure of certain facts of the return decision for reasons of national security, is a specific law applicable in return cases and, to that extent, excludes the general safeguards envisaged in Article 47 of the Charter.
- A preliminary reference could have been addressed to clarification of the standards of Article 47 of the EU Charter with regard to the precise scope of disclosure of the essential grounds requirements first set out in the ZZ preliminary ruling.

Chapter 5 – The impact of the right to an effective remedy on judicial review powers

Following the *Mahdi* preliminary ruling, an efficient judicial review in return proceedings, when pre-removal detention measures are at issue in particular, means the judicial authority has unlimited jurisdiction with regard to the merits of the decision and may substitute its own evaluation for that of the administration, including the possibility of determining alternative measures to detention, even if such an alternative has not been requested by the administration. Additionally, the judge is not limited to evaluating only the elements and facts provided by the administration, but must also take into consideration evidence adduced by the person concerned.

When a possible violation of the principle of non-refoulement is at issue, national courts must exercise ex officio judicial review in order to pre-empt the violation of this absolute fundamental right.

Chapter 6 – Right to an effective remedy and the suspensive effect of appeals

What does the right to an effective remedy under Article 47 of the EU Charter jointly with Article 46 Recast APD entail with regard to the right to remain in the territory?

- Generally, the **automatic right to remain** in the territory is entailed pending the outcome of the appeal (Article 46(5)) or until the appeal time has expired.
- Although the CJUE upheld the discretion recognised by Member States in *Diouf*, whereby they are not required to confer a full examination and suspensive appeal in accelerated procedure where the applicant submits a new asylum application without presenting new evidence,[15] it enhanced the protection of the right to an effective remedy by restating the conclusions reached in the *Abdida* preliminary ruling delivered a year prior to the *Tall* judgment.[16] Therefore the

[15] See CJEU: "*must be stated at the outset that the differences that exist, in the national rules, between the accelerated procedure and the ordinary procedure, the effect of which is that the time-limit for bringing an action is shortened and that there is only one level of jurisdiction, are connected with the nature of the procedure put in place. The provisions at issue in the main proceedings are intended to ensure that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently.*" (para. 65)

[16] CJEU, *Abdida*, C-562/13, 18 December 2014, EU:C:2014:2453, para. 40-45.

principles developed by the CJEU on the suspensive effect of appeal in return proceedings on the basis of Articles 19(2) and 47 of the EU Charter also apply to asylum proceedings.

- ➢ In accelerated asylum procedure, although Member States have retained the freedom to restrict the right to effective remedy (e.g. shorter time limits for lodging appeals, no automatic suspensive effect, limited judicial review powers), the restrictions have to be in line with the requirements of Articles 19(2) and 47 of the EU Charter. Notably, national courts must assess the national implementing provisions not only in light of Article 46 of the Recast Asylum Procedure Directive, but also in light of Article 47 of the EU Charter.
- ➢ Article 47 together with Article 19(2) of the EU Charter requires, within the fast track asylum procedure, a suspensory effect of the appeal, regardless of the number of asylum applications made; it also requires unlimited jurisdiction of the court hearing the appeal, and access to social benefits pending the appeal.
- ➢ According to the *Tall* preliminary ruling, when Article 19(2) of the EU Charter is at stake, Article 47 of the EU Charter requires that only remedies with automatic suspensive effect are deemed effective, "given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized."
- ➢ The **appeal with suspensory effect is necessary "*when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19(2) and 47 of the Charter are met in respect of that third-country national.*"** (*Tall*)
- ➢ **The recognition of an automatic suspensive effect of appeals depends on whether the enforcement of the challenged decision is likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 4 of the EU Charter or Article 3 of the ECHR, and does not depend on the legal qualification of the decision or the type of asylum procedure within which the decision was adopted (i.e. regular, accelerated, border). (*Tall*)**
- ➢ While the suspensive effect of appeal can be subject to restrictions, in the sense of being subject to a separate request, the full and *ex nunc* judicial review cannot be limited.
- ➢ Suspensive effect should be provided for by law, not only in practice (whether administrative or judicial) (*Čonka v. Belgium*, para 83).
- ➢ The principles of effectiveness and Article 46 Recast APD require that time limits must be reasonable. Therefore, although Member States retain discretion in setting out the time limits for appeal, they shall not render an applicant's ability to access an effective remedy impossible or excessively difficult. Reasonableness and proportionality of time limits should be assessed in the abstract as well as in the individual circumstances of the case (*Diouf* para 66). Concretely, time limits for lodging the appeal "must be sufficient in practical terms to enable the applicant to prepare and bring an effective action." (*Diouf*)

What does the right to an effective remedy under Article 47 of the EU Charter entail under return proceedings?

- ➢ The effects of Article 47 of the EU Charter are higher in return proceedings compared to asylum proceedings, due to the fact that the Return Directive does not have an equivalent Article 46 Recast APD general rule of automatic suspensive effect.
- ➢ The CJEU addressed the suspensive effect of appeal in return proceedings following a rejection of a residence permit (*Abdida*). On the basis of the absolute principle of non-refoulement (Article 19(2) of the Charter) and the right to an effective remedy (Article 47 of the Charter), the CJEU established a **mandatory automatic suspensive effect** of the appeal until the claim of risk of refoulement has been closely and rigorously assessed by the determining authority.

- ➢ In *Sow*, the ECtHR explicitly recalled that, when Article 3 of the ECHR is at stake, only the remedies with automatic suspensive effect are deemed effective, "*given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized*."[17] According to the ECtHR, automatic suspensive effect is not only required when there is a complaint regarding Article 3. It also has been held to be necessary when rights under Article 2 and Article 4 of Protocol No. 4 are invoked (Hirsi v Italy, Conka v Belgium)
- ➢ In addition, the suspensive effect of appeal has been successfully argued before the national courts on legal bases other than Articles 47 and 19(2) of the Charter. The **Supreme Court of Estonia** has recognised the automatic suspensive effect of appeal against a removal order on the basis of Articles 8 and 13 of the ECHR. In light of Article 52(3) of the Charter a similar interpretation should also be applied to Articles 7 and 47 of the Charter.

The Impact of the CJEU preliminary rulings at the national level:

- ➢ Disapplication of national law that did not recognise the suspensory effect of appeal in accelerated proceedings (**Belgium**) and return proceedings (**Belgium**);
- ➢ Extension of the suspensory effect of appeal in return proceedings also in cases of potential violations of relative rights (**Estonia**);
- ➢ Extension of automatic suspensory effect of appeals in accelerated proceedings, although the national legislation only recognised it by way of individual request, on the basis of Article 47 of the EU Charter and Articles 3 and 13 of the ECHR as well as the principle of celerity of asylum proceedings (**Italy**, partial jurisprudence);
- ➢ Clarification of the extent of implications of *Tall* and *Abdida* on procedures that provide suspensory effect of appeal only by interim relief.

Chapter 7 – Minors – procedural guarantees (age assessment)

Age assessment is a relevant issue that appears within different phases of international protection proceedings and has a direct impact on, *inter alia*, the credibility assessment of asylum seekers, their reception conditions and alternative measures to immigration detention. This section explores the effects of Article 47 of the EU Charter and the general principles of EU law on national practices concerning age assessment in asylum and return adjudication.

The role of courts in guaranteeing the effective nature of the remedy provided against an unlawful age assessment procedure is essential, especially due to a lack of common standards within the EU Member States and bearing in mind the fundamental principles enshrined in EU law:

a) the prominent role of the best interests of the child, which is expressly ratified at the EU level (Article 24 of the EU Charter);
b) the presumption of minor age in case of uncertain outcomes of the age assessment;
c) medical assessment as a last resource procedure and the need for a multidisciplinary and holistic evaluation. The judgments analysed seem to show consolidation, at the judicial level if not at the legislative one, of common trends among national jurisdictions, which are used to enforce the European standard recalled above. It is worth underlining recognition of the right to be assisted during the procedure and duly and promptly informed on the age assessment outcomes, in order to effectively exercise the right to appeal against the decision.

With this background in mind, the cases briefly analysed seem to show that judicial review in this context is not limited to procedural aspects, but can also check the legitimacy of the evaluation made by the public administration on the grounds of assessment outcomes (fettering of discretion). From the perspective of the right to an effective remedy, it can be said that age determination can be the object of

[17] ECtHR, *Sow v. Belgium*, App. 27081/13, 19 January 2016, para. 47. See also Jabary v. Turkey, App. 40035/98, 11 July 2000, para. 50.

judicial review as an autonomous and specific (separate) ground of appeal, even when age assessment is functional to other administrative decisions (i.e. detention of an unaccompanied minor, see the UK High Court of Justice case analysed above). As a matter of common trend within the jurisdictions analysed, this is particularly relevant from the perspective of the right to an effective remedy, as it gives the right to challenge an administration's measures (detention, access to a reception system, determination of individual status) directly and autonomously on the grounds of the illegitimacy of the age assessment procedure or the way in which competent public officers made use of assessment outcomes within broader administrative determinations, as well as autonomous grounds of motivation within criminal cases (see Tribunal of Torino). It also matters in terms of the principle of good administration when declined in terms of fairness and fettering of discretion.

In light of this, it should be considered significant that:

d) The merit of the decision can also be the object of judicial review as it cannot be the outcome of a mere exercise of discretionary power of the competent authority (see *case Anor* in the **UK**). Administrative authorities are called to adequately interpret the assessment outcomes, according to the principle of good faith (**Spanish Supreme Court**).
e) Judges can also assess not only the legal but also the scientific rationale and reliability of the age assessment procedures implemented by national authorities, thus providing individuals (in many cases, unaccompanied minors) with an effective remedy against an inconsistent determination of age (**Italian** cases).
f) In specific cases, the duty to cooperate of the alleged minor can be determined, refusal to give consent to medical examinations within an age assessment procedure based exclusively on physical appearance, can be considered unreasonable, thus recalling the "duty" to cooperate with the procedure when it is necessary to enable the authority in charge of age assessment to defend the challenge of its outcomes (**UK Court of Appeal**).